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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. MCCREARY - - - - *Petitioner*

versus

COMMONWEALTH OF KENTUCKY - *Respondent*

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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March 15, 1996

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14 pp

QUESTION PRESENTED FOR REVIEW

I. The Movant has presented the following question to this Court for Review: Whether the Kentucky trial court violated the Movant's Fifth and Fourteenth Amendment rights against self incrimination by allowing into evidence proof of the Movant's refusal to submit to a breath test and allowing the Commonwealth to comment on that refusal at trial after the Movant had been informed of his Miranda rights by law enforcement officers after he was informed of outstanding arrest warrants against him on unrelated charges.

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May It Please The Court:

Comes the Respondent, the Commonwealth of Kentucky, by counsel, and for its Response to the Petition for a Writ of Certiorari to the Supreme Court of the United States, states as follows:

INTRODUCTION

The Movant has requested this Honorable Court to issue a Writ of Certiorari to the Supreme Court of Kentucky to review the decision of the Supreme Court of Kentucky which denied the Movant discretionary review, declining to review the decision of the Court of Appeals of Kentucky's denial of discretionary review, which declined to review the Jefferson Circuit Court's decision to AFFIRM the conviction of the Movant for Driving Under the Influence of

Alcohol, Second Offense within the last five years. Movant did not appeal his convictions for Reckless Driving and Speeding. For the following reasons, Respondent prays that this Honorable Court not issue the Writ.

OPINIONS BELOW

A true copy of the opinion of the Supreme Court of Kentucky can be located at page 1a of the Appendix contained in Movant's Petition for Writ of Certiorari. A true copy of the opinion of the Court of Appeals of Kentucky can be located at page 2a of the Appendix contained in Movant's Petition for Writ of Certiorari. A true copy of the opinion of the Jefferson Circuit Court can be located at pages 3a-7a of the Appendix contained in Movant's Petition for Writ of Certiorari. A true copy of the opinion of the trial court, the Jefferson District Court, can be located at pages 8a-9a of the Appendix contained in Movant's Petition for Writ of Certiorari.

PARTIES TO THE PROCEEDING

The Movant is Thomas W. McCready. The Respondent is the Commonwealth of Kentucky. No other parties to the proceeding are known to the Respondent.

STATEMENT OF MATERIAL FACTS

On or about October 30, 1994, Officer Charles Howard of the Louisville Division of Police, at about 12:50 a.m., observed the Movant, Thomas W. McCreary, (hereinafter "Movant") driving northbound on Third Street at a high rate of speed and in a very erratic manner. Officer Howard testified that the Movant was weaving in both northbound lanes of Third Street and further crossed over the center line of the road, into the southbound lanes of Third Street, causing another vehicle to swerve in order to avoid being struck by Movant's vehicle. Officer Howard paced the Movant's vehicle with his own police cruiser doing 54 miles per hour in a posted 35 mile per hour zone.

Officer Howard activated his emergency lights and siren, however, Movant did not immediately stop his vehicle, but proceeded to turn a corner and enter a driveway some four doors down the street. Upon exiting the vehicle, Movant told Officer Howard that this house was his destination.

Officer Howard could smell alcohol on Movant's breath, even though Movant attempted to speak downwards towards the ground, so that Officer Howard could not smell his breath. Officer Howard, believing Movant to be under the influence of alcohol, gave the Movant five field sobriety tests, of which Movant failed all five. The Movant was informed of his Miranda rights, and placed under arrest for Driving Under the Influence of Alcohol, Second Offense within the last five years, Reckless Driving, and Speeding more that 10 miles over the posted speed limit. Officer Howard began to transport Movant to the jail. In doing so, he was informed by police radio that Movant had three outstanding warrants for his arrest on other matters.

Upon reaching the jail, Movant was immediately turned over to Corrections Officer Daniel Marvel. Officer Marvel is a Breath Test Operator, and further, is a Breath Test Maintenance Technician. Officer Marvel again informed Movant of his Miranda rights, and further requested that Movant submit to a breath test to determine the alcohol content of his breath. Movant requested that he be allowed to speak to his attorney, at which time Officer Marvel ceased all questioning of the Movant, however, Officer Marvel insisted that Movant submit to the breath test. Movant stated that he wished to speak to his attorney prior to submitting to the breath test. Officer Marvel verbally instructed the Movant that according to certain United States Supreme Court cases, he was not entitled to speak to his attorney prior to submitting to a test of his breath. Movant continued to request to speak to his attorney prior to submitting to the breath test, at which point Officer

Marvel regarded this act as a refusal to submit to the breath test, and terminated the session. Officer Marvel was able to form an opinion of the sobriety of the Movant based upon his observations, and he concluded that Movant was under the influence of intoxicants at that time.

Movant made a motion to the trial court to suppress the breath test, based upon his Miranda "confusion." Movant argued that he was entitled to speak to his attorney prior to taking the breath test, since he had arrest warrants on other pending matters against him at the time. The trial court overruled this motion, stating that Movant had no right to speak to his attorney prior to taking the breath test.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY NOT SUPPRESSING THE MOVANT'S BREATH TEST ON THE GROUNDS OF "MIRANDA CONFUSION", SINCE THE MOVANT DID NOT HAVE A RIGHT TO SPEAK TO HIS ATTORNEY PRIOR TO GIVING THE BREATH SAMPLE. THEREFORE, THE OPINIONS OF THE JEFFERSON CIRCUIT COURT, THE COURT OF APPEALS OF KENTUCKY, AND THE SUPREME COURT OF KENTUCKY WHICH UPHELD THE TRIAL COURT ARE NOT IN ERROR.

Movant argues that the trial court, the Jefferson District Court, erred when it failed to suppress the results of the breathalyzer test offered to the Movant after the Movant had first been given his Miranda warnings, and had invoked those rights by asking to speak to his attorney. The Commonwealth of Kentucky states that since the Movant had no right to speak to his attorney prior to giving the breath sample, there was no error in not suppressing this test.

First, the Commonwealth would state that the only one who seems to have "Miranda Confusion" is the Movant. Movant seems to have confused his Fifth Amendment right to remain silent with his Sixth Amendment right to counsel. Movant has argued that because he had also been charged with other outstanding warrants that were discovered by Officer Howard on the way to the jail, that he was entitled to exercise his right to counsel before any breath test could be taken. This is just not the case.

The agent of the Commonwealth, Officer Daniel Marvel, immediately ceased all questioning of the Movant when Movant asked to speak to his attorney. This was proper. However, Officer Marvel insisted on administering the breath test, since Movant had no right to speak to an attorney prior to being offered this test.

This Court has found that a defendant does not have the right to have an attorney present prior to submitting to a breath test. The Court found that the breath test was a search of the person of the defendant rather than a statement or admission by the defendant. *Schmerber* v. *State of California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Therefore, a defendant charged with DUI does not have a right to an attorney prior to submitting to this test, since it is not giving evidence against himself in violation of his Fifth Amendment right to remain silent. The fact that the Movant had outstanding warrants for his arrest at the time should not change this rule. Officer Marvel did not question Movant about the outstanding warrants. In fact, it is not disputed that Officer Marvel ceased all questioning when the Movant stated that he wanted to speak to his attorney. However, Officer Marvel did insist upon administering the breath test in the drunk driving case. The breath test had absolutely nothing to do with the cases involved with the outstanding warrants.

Since the drunk driving case had absolutely nothing to do with the cases involved with the outstanding warrants,

and Officer Marvel correctly ceased all questioning of the Movant upon Movant exercising his right to counsel, there should be no argument that Movant's Constitutional rights were violated. Pursuant to *Schmerber, supra*, Movant had no right to counsel being present prior to submitting to the breath test and all other questioning ceased, therefore, none of Movant's rights were violated. The two cases had nothing to do with each other. The warrants were completely separate cases from the drunk driving case. The Commonwealth of Kentucky should be entitled to administer the breath test as quickly as possible to preserve the evidence, and not have to wait for the delay which would inevitably occur if the Movant was allowed to speak to his attorney on a totally unrelated matter prior to the administration of the breath test.

In *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), this Court further held that procedures such as fingerprinting and the taking of blood or breath samples for analysis were not critical stages of a prosecution so as to require the presence of counsel under the Sixth Amendment. Therefore, Movant was not entitled to speak to his attorney prior to the breath test. Since the breath test had absolutely no relation to the outstanding arrest warrants, the administration of the breath test would not violate the rights of the Movant on the totally unrelated charges. After Movant had taken the breath test, if he had done so, he would have been placed in a holding cell where there are two telephones with which he could have contacted his attorney to speak about the outstanding warrants as well as the drunk driving charge. None of Movant's Constitutional rights were violated. No questions were asked of Movant after he invoked his right to counsel. He was only requested to submit to the breath test, for which he does not have a Fifth Amendment right or a Sixth Amendment right to counsel.

Kentucky case law follows the reasoning of this Court's cases. In *Newman* v. *Stinson,* Ky., 489 S.W.2d 826 (1972), the then Court of Appeals of Kentucky (now the Supreme Court of Kentucky) held that the Fifth Amendment right to remain silent was not involved in the taking of breath samples for analysis for the reason that the administration of such tests are searches of the person of the defendant for evidence rather than a compulsion of testimony.

In *Newman* v. *Hacker,* Ky., 530 S.W.2d 376 (1975), the then Court of Appeals of Kentucky held that a defendant had no right to have counsel present at the time the breathalyzer test was administered. This reasoning was followed in *Elkin* v. *Commonwealth ex rel. Department of Transportation,* Ky.App., 646 S.W.2d 45 (1982).

In *Commonwealth ex rel. Transportation Cabinet* v. *Cornell,* Ky.App., 796 S.W.2d 591 (1990), the present Court of Appeals of Kentucky went through a discussion of the applicable law and concluded that a defendant has "no right to consult with his attorney or to have his attorney present during the taking of the [breath] test so the *Miranda* rights were not applicable . . . ." There was no error in admitting the refusal to submit to the breath test, since Movant had no right to counsel prior to submitting to the test, and the outstanding warrants had nothing to do with the drunk driving case. In addition, all questioning of the Movant ceased upon his exercise of his right to have his attorney present.

Movant argues that the Commonwealth was allowed to comment on his refusal to take the breath test and that these comments somehow prejudiced him in front of the jury. In *Commonwealth* v. *Hager,* Ky., 702 S.W.2d 431 (1986), the Supreme Court of Kentucky overruled their prior holding in *Hovious* v. *Riley,* Ky., 403 S.W.2d 17 (1966), in light of the case of this Court's holdings in *South Dakota* v. *Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d

748 (1983). In *Neville*, this Court held that the admission into evidence of a defendant's refusal to submit to a blood alcohol test does not offend his Fifth Amendment right against self-incrimination. In *Hagler*, the Supreme Court of Kentucky was urged to adopt more stringent rules of constitutional construction than the United States Supreme Court had set forth in *Neville*, however, they declined to do so. Therefore, commenting on the Movant's failure to take the breath test that was offered to him by Officer Marvel was not a violation of his Fifth Amendment right to remain silent either under Kentucky law or the law as set forth by the United States Supreme Court.

Since there was no error in admitting the Movant's refusal to take the breath test, nor in allowing the Commonwealth to comment about said refusal during the trial, this Court should uphold the Kentucky Courts on this issue, and refuse to issue the Writ of Certiorari. .

CONCLUSION

The trial court and Circuit Court in review of the trial court did not err in not suppressing the Movant's breath test and the Court of Appeals and the Supreme Court of Kentucky did not err in refusing to grant discretionary review of the lower courts' opinions, since the Movant did not have a right to speak to his attorney prior to being required to submit or decline to submit to giving a breath sample, and the Commonwealth was allowed to comment during trial on his refusal to submit to the breath test, without offending Movant's Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the following Brief in Opposition to Petition for Certiorari to the Supreme Court of the United States has been mailed, postage prepaid, to: The Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543; Hon. Teddy B. Gordon, 807 West Market Street, Louisville, KY 40202; Attorney for Movant; Hon. Geoffrey P. Morris, Judge, Jefferson Circuit Court, Thirteenth Division, Third Floor, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Deborah DeWeese, Judge, Jefferson District Court, First Floor, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Marc Murphy, Commonwealth's Attorney for the 30th Judicial District, 514 West Liberty Street, Louisville, KY 40202; Hon. Ben Chandler, Attorney General of Kentucky, Capitol Building, Frankfort, KY 40601; Hon. Mike Conliffe, Jefferson County Attorney, First Floor, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Janet Reno, Attorney General of the United States, 5111 Main Justice Building, Tenth Street & Constitution Avenue, N.W., Washington, D.C. 20530; Mr. Tony Miller, Clerk of the Jefferson Circuit Court, Second Floor, Hall of Justice, Louisville, KY 40202; Hon. George E. Fowler, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Capitol Building, Frankfort, KY 40601; on this the 14 day of March, 1996.

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